Supreme Court, U.S.
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No. 00-361

IN THE

Supreme Court of the United States

MARGARET K. MICHAELS,

Petitioner,

v.

GEORGE McGRATH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SARA SENCER-McARDLE

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REASONS FOR DENYING THE WRIT

MICHAELS HAS FAILED TO SET FORTH A COMPELLING REASON FOR GRANTING HER PETITION FOR A WRIT OF CERTIORARI. HER PETITION, THEREFORE, MUST BE DENIED.

Supreme Court Rule 10 ("Considerations Governing Review on Certiorari") sets forth the rationale underlying the Court's basis for granting a party's petition for certiorari. As stated in pertinent part, Supreme Court Rule 10 expressly states that "review on a writ for certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

McArdle respectfully submits that a careful review of Margaret Kelly Michaels' (hereinafter "Michaels") petition reveals the absence of a single compelling reason for granting her writ of certiorari. McArdle respectfully submits this brief in opposition to Michaels' petition for a writ of certiorari and respectfully beseeches the Court, for all of the following reasons, to deny Michaels' petition.

Michaels contends that this Court must grant certiorari to correct the Court of Appeals' allegedly erroneous determination that Michaels has no right to redress under 42 U.S.C. § 1983 for the State's use of "improperly obtained statements of third parties" against her in the criminal prosecution of her. She argues:

> The Court of Appeals' decision is based on the district court's decision which leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements of third parties are used against them in a criminal prosecution.

(Pb at 7.)

In furtherance of her position, Michaels sets forth three alleged deficiencies in the Court of Appeals' reasoning, which purportedly require this Court's intervention. (Pb at 7.) McArdle respectfully submits that a searching review of each of these alleged deficiencies will lead this Court to the inescapable conclusion that none of them, whether viewed together or separately, constitutes sufficient reason for granting Michaels' petition.

Furthermore, Michaels' petition incorporates an argument questioning the district court's holding that McArdle was entitled to absolute immunity for all of her prosecutorial functions. This is an argument that Michaels never articulated or advanced in the court below. Michaels' appeal to the United States Court of Appeals for the Third Circuit challenged only the district court's determination that McArdle and the other defendants were entitled to qualified immunity for certain of their actions. Michaels failed to seek appellate review of the district court's ruling as to the applicability of absolute immunity to most of McArdle's actions. Now, Michaels is attempting to assert for the first time in the appellate process an argument in opposition to the affirmative defense that was raised by McArdle in the district court. This Court should not consider this purported issue since Michaels did not seek relief in the Court of Appeals from the district court's determination. The Supreme Court will not ordinarily consider issues that are neither raised nor considered by the Court of Appeals. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998). Furthermore, the district court and the Court of Appeals for the Third Circuit both found that McArdle was entitled to absolute immunity for her trial work as well as for all of her actions involving the three Grand Juries once probable cause was established in her mind. That finding was consistent with the applicable case law. Therefore, even if Michaels had perfected her right to appeal the lower courts' determination on that issue to this

Court, it would not be a basis for granting the relief she seeks on the instant petition.

A. The Court Of Appeals' Decision Was Consistent With This Court's Decision In *Imbler v. Pachtman* And More Than Twenty-Five Years Of United States Supreme Court Precedent. For Reasons Of "Stare Decisis", Michaels' Petition For A Writ Of Certiorari Must Be Denied.

The first alleged deficiency Michaels points to as supporting this petition addresses the Court of Appeals' entirely proper reliance upon the Court of Appeals for the Seventh Circuit's opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). Michaels contends:

> The Seventh Circuit's majority opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995) directly conflicts with the dissenting opinion regarding the existence of a criminal defendants' rights and is inconsistent with the broad scope of the intended civil remedies for a criminal defendant pursuant to 42 U.S.C. § 1983.

(Pb at 7.)

Michaels' initial basis for seeking certiorari in this case is not that this Court's intervention is necessary because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a). Rather, her initial basis for seeking certiorari is her challenge of the Court of Appeals for the Third Circuit's reliance upon a decision from the Seventh Circuit that contained a majority opinion and a dissenting opinion that

were in "direct conflict" with one another. (Pb at 7.) Not surprisingly, Michaels cites no authority from this Court or any other court to suggest that the existence of a strident dissenting opinion in a particular case precludes another court from relying upon that case's majority opinion. Also, as indicated in the complete citation of the *Buckley* opinion referenced above, this Court had the opportunity to grant a petition for a writ of certiorari from the decision of the Court of Appeals for the Seventh Circuit and declined to do so. 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995).

Furthermore, the jurisprudence of this Court and the various United States Courts of Appeals in this area belies Michaels' assertion that the Court of Appeals' decision in this case is consistent with only the majority opinion of a divided United States Court of Appeals for the Seventh Circuit in *Buckley*. Rather, as set forth at length in the Court of Appeals' opinion and the district court's opinion, both lower courts modeled their opinions after this Court's jurisprudence, beginning with this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Justice Stevens discussed 42 U.S.C. § 1983 and this Court's decision to limit the rights of a § 1983 plaintiff to recoup money damages against a prosecutor for functions he or she performed as a prosecutor in the underlying criminal action in *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). Writing for a unanimous Court, Justice Stevens spoke of the statute's history and purpose:

> Section 1983 is a codification of § 1 of the Civil Rights Act of 1871. The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights. The coverage of this statute is thus broader than the pre-existing common law of torts. We have nevertheless recognized that Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment. [Citations omitted.] Thus we have examined common-law doctrine when identifying both the elements of the cause of action and the defense available to state actors.

Kalina, 522 U.S. at 123, 118 S. Ct. at 506.

Justice Stevens then proceeded to discuss in detail this Court's decision in *Imbler*:

> [W]e held that a former prisoner whose conviction had been set aside in collateral proceedings could not maintain a § 1983 action against the prosecutor who had litigated the charges against him. Relying in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent we concluded that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" was not amenable to suit under § 1983. *Imbler*, 424 U.S. at 410, 96 S. Ct. at 985.
>
> Liberally construed, Imbler's complaint included not only a charge that the prosecution had been wrongfully commenced, but also a charge that false testimony had been offered as well as a charge that exculpatory evidence had been suppressed. His constitutional claims were thus broader than any specific common-law antecedent. Nevertheless, relying on common-law decisions providing prosecutors with absolute

> immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause, as well as from actions for defamation based on statements made during trial, we concluded that the statute should be construed to provide an analogous defense against the claims asserted by Imbler. *The policy considerations that justified the common-law decisions affording absolute immunity to prosecutors when performing traditional functions applied equally to statutory claims based on the conduct of the same functions.*

Kalina, 522 U.S. at 123-125, 118 S. Ct. at 506-07. Emphasis added.

Justice Stevens continued:

> Those considerations included both the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when "deciding which suits to bring and in conducting them in court." *Imbler*, 424 U.S. at 424, 96 S. Ct. at 992. The former interest would lend support to an immunity from all litigation against the occupant of the office whereas the latter is applicable only when the official is performing functions that require the exercise of prosecutorial discretion. Our later cases have made it clear that it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of the primary importance.

Kalina, 522 U.S. at 125, 118 S. Ct. at 507.

In this matter Michaels alleged that McArdle "deliberately and knowingly submitted misleading and false evidence and testimony to the Grand Jury to maliciously and negligently procure an indictment." (Michaels' Amended Complaint at First Count, ¶ 23.) Furthermore, Michaels alleged that McArdle "deliberately, recklessly, negligently and knowingly submitted misleading false evidence and testimony to the trial jury and as a proximate result thereof, Plaintiff Margaret Kelly Michaels was convicted and subsequently incarcerated." (Michaels' Amended Complaint at First Count, ¶ 24.)

Thus, notwithstanding Michaels' assertions to the contrary, she petitions this Court to overturn established, long-standing jurisprudence. Michaels' allegations against McArdle have consistently been comprised of two prongs. The first prong is that McArdle (either personally or through the Essex County Prosecutor's Office's investigators) utilized improper interrogation techniques to obtain statements from the children who were the alleged victims of sexual abuse at Michaels' hands. The second prong, as set forth in the preceding paragraph, is that McArdle presented the testimony obtained as a result of the allegedly improper interrogation techniques to obtain three Grand Jury indictments and, following a lengthy criminal trial, a conviction of Michaels, which otherwise would not have been obtained.

In an effort to divert this Court's attention from the fact that she seeks the opportunity to prosecute a cause of action against McArdle, which this Court has repeatedly held cannot exist as a matter of law, Michaels has framed the reason underlying her petition as follows:

> THE COURT OF APPEALS' DECISION LEAVES AN ENTIRE CLASS OF CRIMINAL DEFENDANTS WITHOUT THE BENEFIT OF § 1983 REDRESS BY FINDING THAT

CONSTITUTIONALLY PROTECTED RIGHTS DO NOT EXIST WHEN IMPROPERLY OBTAINED STATEMENTS OF THIRD PARTIES ARE USED AGAINST THEM IN A CRIMINAL PROSECUTION.

(Pb at 7.)

In *Imbler*, this Court concluded that the prosecutor's activities at issue "were intimately associated with the judicial phase of the criminal process and thus were functions to which the reasons for judicial immunity apply with full force." *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995. *See also Kalina*, 522 U.S. at 125, 118 S. Ct. at 507. Recently, in *Kalina*, Justice Stevens discussed some of the cases that this Court has decided in the wake of *Imbler* and the Court's reaffirmation of its holding in *Imbler*:

> Subsequent cases have confirmed the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings. Thus, in *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991), after noting the consensus among the Courts of Appeals concerning prosecutorial conduct before grand juries, *id.*, at 490 n.6, 111 S. Ct. at 1941 n.6, we held that the prosecutor's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing were protected by absolute immunity. *Id.* at 492, 111 S. Ct. at 1942-43. And, in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1996), we categorically stated that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the

> protections of absolute immunity." 509 U.S. at 273, 113 S. Ct. at 2615.

Kalina, 522 U.S. at 125-126, 118 S. Ct. at 507.

The district court granted summary judgment in McArdle's favor with respect to Michaels' § 1983 malicious prosecution claim against her, a decision that was affirmed by the United States Court of Appeals for the Third Circuit. Michaels' § 1983 malicious prosecution claim against McArdle derived from McArdle's alleged submission of false and misleading testimony and evidence by McArdle to the three Grand Juries in order to procure an indictment. Michaels' § 1983 malicious prosecution claim against McArdle also derived from McArdle's alleged submission of false and misleading testimony and evidence to the trial jury in order to obtain a conviction. Thus, Michaels' allegations with respect to McArdle directly addressed McArdle's initiation of the criminal prosecution against Michaels and the manner in which McArdle presented witness testimony and evidence to the Grand Juries and the trial jury.

McArdle's conduct that formed the basis of Michaels' civil action against her is unquestionably conduct for which McArdle as a prosecutor has traditionally been afforded absolute immunity from liability by this Court. "The duties of the prosecutor in [her] role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Buckley*, 113 S. Ct. at 2615, citing *Imbler*, 424 U.S. at 431 n.33. Assuming *arguendo* that McArdle had presented deliberately false and misleading testimony to the Grand Juries and/or the trial jury, her conduct was still within the ambit of her role as an advocate for which she is absolutely immune from liability. "An effort to control the presentation of a witness' testimony

was entitled to absolute immunity because it was fairly within [the prosecutor's] function as an advocate." *Buckley*, 113 S. Ct. at 2615, citing *Imbler*, 424 U.S. at 430 n.32.

The Court of Appeals for the Third Circuit has followed this Court's lead in this area. In *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), the Court of Appeals affirmed the district court's dismissal of a complaint against defendant prosecutors. In doing so the court observed that:

> the plaintiff's allegations involve direct solicitations of testimony for use in the grand jury proceedings. Such solicitations are encompassed within the "preparation necessary to present a case" and therefore are immunized as involving the prosecutors' advocacy functions.

Rose, 871 F.2d at 344.

The court in *Rose* also cited with approval the reliance placed by the district court upon *Tate v. Grose*, 412 F. Supp. 487 (E.D. Pa. 1976) in support of its dismissal of the plaintiff's complaint:

> There is no reason to depart from a rule of absolute prosecutorial immunity merely because the complaint alleges that the defendants not only used perjured testimony against plaintiff but solicited that perjured testimony as well. To allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited.

Rose, 871 F.2d at 344 n.8, citing *Tate*, 412 F. Supp. at 488.

The Court of Appeals for the Third Circuit reiterated its position in *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994). In *Giuffre*, the court held that "a prosecutor is absolutely immune when making his decision [to initiate a prosecution] even when he acts without a good faith belief that any wrongdoing occurred." *Id.* at 1352. *See also Rose*, 871 F.2d at 347 n.12.

Recently, the Court of Appeals for the Third Circuit had the opportunity to revisit the issue of a prosecutor's absolute immunity. It did so in a civil action against a variety of State officials arising from the decision not to provide exculpatory evidence to the plaintiff's counsel while the plaintiff was the defendant in the underlying murder trial. In *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000), the court noted:

> It was Guida, the prosecutor, who made the decision not to disclose the lifters [the exculpatory evidence] to Smith's counsel. At the time he made that decision Guida represented the Commonwealth's interests, not the interests of Holtz, Dove or Yatron. However, Guida, as prosecutor, has absolute immunity from liability in Smith's § 1983 action so long as he was functioning in his prosecutorial capacity when he made that decision. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (prosecutor has absolute immunity in § 1983 action for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial).

Smith, 210 F.3d at 199-200 n.18.

McArdle respectfully submits that a fair and careful review of the evidence before it will lead this Court to the

inescapable conclusion that, despite Michaels' representations to the contrary, there is nothing here that warrants this Court ignoring its own precedent and creating an arbitrary exception to *Imbler*. As Justice Scalia wrote in his concurring opinion in *Kalina*, "both *Imbler* and the "functional" approach are so deeply embedded in our § 1983 jurisprudence that, for reasons of *stare decisis*, I would not abandon them now." *Kalina*, 522 U.S. at 135, 118 S. Ct. at 512 (Scalia, J., concurring.) Similarly, McArdle respectfully submits that Michaels has not presented this Court with any basis for abandoning them at this time.

B. There Is No Inconsistency Between The Courts Of Appeals That Needs To Be Addressed By This Court. Thus Michaels' Petition For A Writ Of Certiorari Must Be Denied.

Michaels further asserts that certiorari must be granted here to resolve the dispute between the Court of Appeals for the Seventh Circuit in its *Buckley* opinion and the Court of Appeals for the Tenth Circuit in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). (Pb at 7.) She further asserts that certiorari is necessary here because the subject decision of the Court of Appeals for the Third Circuit is inconsistent with *Clanton* and the Court of Appeals' reasoning was materially flawed. (Pb at 9 and 10.) Michaels' position that a conflict between the various Courts of Appeals on the relevant issues herein is completely devoid of merit. No such dispute exists. Thus, for the following reasons, McArdle respectfully submits that the petition for a writ of certiorari to address this non-existent conflict must be denied.

Michaels' assertion that there is a dispute between the decision of the Court of Appeals for the Seventh Circuit in *Buckley* and the Court of Appeals for the Tenth Circuit in *Clanton* is erroneous. In *Clanton*, the Court of Appeals for the Tenth Circuit affirmed a district court's decision that

Agent Cooper of the Oklahoma State Fire Marshal's Office was not entitled to qualified immunity for the methods he employed in obtaining a confession from a third party that was used as the basis for issuing a warrant for the plaintiff's arrest. *Clanton*, 129 F.3d at 1154. The court stated, "Clanton has stated a legally cognizable Section 1983 claim to the extent that she has alleged that Cooper knowingly and intentionally swore to untrue facts in an affidavit to obtain Clanton's arrest warrant." *Id.* at 1155.

In reaching that conclusion the court in *Clanton* ruled that the plaintiff had the right to contest the voluntariness of the third party's confession, which had served as the basis for the warrant for her arrest. *Id.* at 1157. The court observed "a constitutional violation may assist officers in gathering evidence, but the violation has both offended the Constitution and rendered the evidence unreliable. A coerced confession fits into this category." *Clanton*, 129 F.3d at 1157. The court continued by stating "consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person." *Clanton*, 129 F.3d at 1157-58.

Seemingly unbeknownst to Michaels, one of the court's bases for its holding was the majority opinion in *Buckley*. ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause." *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), *Clanton*, 129 F.3d at 1158.) Thus, consistent with the position expressed by the United States Court of Appeals for the Seventh Circuit in *Buckley*, the United States Court of Appeals for the Tenth Circuit in *Clanton* concluded "Clanton may contest the voluntariness of Eave's confession not based on any violation of his

constitutional rights, but rather as a violation of her own Fourteenth Amendment right to due process." *Id.* at 1158.

Michaels ignores the distinction between the State actors who were involved in the *Buckley* and *Clanton* matters. As noted above, the plaintiff in *Clanton* alleged it was Agent Cooper, a State Fire Marshal, whose conduct violated her due process rights. In *Buckley*, the plaintiff alleged that the prosecutor, Fitzsimmons, and several of his assistants were the individuals whose conduct violated his due process rights. In *Buckley*, the Court of Appeals for the Seventh Circuit framed the issues with which it was confronted subsequent to this Court's remand:

> The Supreme Court found "unclear" the "precise contours" of Buckley's claim that the prosecutors violated the due process clause "through extraction of statements implicating him by coercing two witnesses and paying them money." __ U.S. __, 113 S. Ct. at 2619. It evidently expected Buckley to elaborate on remand; so did we. Instead Buckley simply referred us to the very paragraphs of the complaint that perplexed the Justices .... According to the complaint, the interrogation and payments took place early in the investigation, while the prosecutors were just beginning to piece events together. Thus there cannot be absolute immunity. But qualified immunity is available unless the acts violated "clearly established" constitutional norms. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). What this complaint alleges does not state a claim under the Constitution, let alone suggest a violation of clearly established rights.

Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995).

The plaintiff's allegations against the prosecutors in *Buckley* were "the prosecutors repeatedly interrogated two other persons, that the prosecutors paid them for statements inculpating him, that during the interrogations the prosecutors 'coerced' them to finger him and that the accusations Cruz and Hernandez leveled against him are 'obviously false'." *Id.* at 794. In *Buckley*, the Court of Appeals for the Seventh Circuit correctly recognized that Buckley had no remedy under § 1983 against the prosecutors for their alleged use of unreliable, false witness testimony at the Grand Jury and at trial:

> For if the constitutional entitlement is a right to prevent use of the confession at trial (or before the grand jury) then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity.... Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs. __ U.S. __ n.3, 113 S. Ct. at 2612 n.3 (approving or at least not disturbing our prior holding to that effect).

Buckley, 20 F.3d at 795.

A fair and thorough review of the decision rendered by the United States Court of Appeals for the Seventh Circuit in *Buckley* and the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Clanton* reveals

that no conflict exists. The *Buckley* court and the *Clanton* court agreed that using a confession coerced from a third party against a defendant at trial would infringe upon the defendant's due process rights. In *Buckley*, the Court of Appeals for the Seventh Circuit had to rule upon the question whether the prosecutors' use of the coerced confessions at trial could serve as the basis for the plaintiff's § 1983 claim against the prosecutors. The court held, in accordance with this Court's jurisprudence that "*using the confession could violate Buckley's rights but would be covered by absolute immunity*. . . . Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." *Buckley*, 20 F.3d at 795. (Emphasis added.) Michaels' claim of a conflict between the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Tenth Circuit is not supported by the case law upon which she relies. The purported dispute between the circuits does not exist.

Here, Michaels alleged that McArdle violated her constitutional rights because she "deliberately and knowingly submitted misleading and false evidence and testimony to the Grand Jury to maliciously and negligently procure an indictment." (Michaels' Amended Complaint at First Count, ¶ 23.) Furthermore, Michaels alleged that McArdle "deliberately, recklessly, negligently and knowingly submitted misleading false evidence and testimony to the trial jury and as a proximate result thereof, Plaintiff Margaret Kelly Michaels was convicted and subsequently incarcerated." (Michaels' Amended Complaint at First Count, ¶ 24.) Michaels' allegations as to McArdle are similar to those advanced by the plaintiff in *Buckley*. It is beyond dispute, as set forth in this brief and in the preceding citation from *Buckley*, that even if Michaels' allegations as to McArdle are true, McArdle is absolutely immune from liability for all of her actions as an advocate whether before a grand jury or at trial.

Michaels' erroneous interpretation of the decision of the Court of Appeals for the Tenth Circuit in *Clanton* is the underlying basis of her claim that the Court of Appeals for the Third Circuit erred in its analysis of McArdle's role in gathering and using the statements that inculpated Michaels. Michaels argues that "pursuant to the mandate of *Clanton*, neither the investigators nor the prosecutors should be immune from liability for their role in obtaining the improper statements." (Pb at 10.) McArdle submits that no such error was made by the Court of Appeals for the Third Circuit.

In *Clanton*, the state actor against whom Clanton brought her § 1983 claim was Cooper, an agent with the Oklahoma State Fire Marshal's Office. *Clanton*, 129 F.3d at 1152. Inasmuch as Cooper never performed any "quasi-judicial" functions, the court never had to consider whether he was absolutely immune from liability. Rather, the question for the court's consideration was whether Cooper was entitled to the protection of qualified immunity. *Id*. at 1152.

The threshold consideration in determining the viability of the affirmative defense of qualified immunity to a public official's conduct is "whether the plaintiff's claims make out a constitutional violation." *Assaf v. Fields*, 178 F.3d 170, 174 (3d Cir. 1999). In this matter, the Court of Appeals for the Third Circuit held unanimously that "the district court did not err in concluding that Michaels did not demonstrate a violation of her constitutional rights when the defendants employed improper interview techniques with the children." *Michaels v. State of New Jersey, et al.*, No. 99-5486 (filed June 5, 2000), at Michaels' App. 12. McArdle submits that the Court of Appeals' ruling below is a correct application of the relevant law to the facts of this matter and should end this Court's inquiry into the issue of qualified immunity. However, assuming *arguendo* that Michaels' constitutional rights were violated by the interrogation techniques employed in the criminal prosecution, McArdle would still

be entitled to the protection of qualified immunity for her actions in obtaining the allegedly improper statements.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) this Court held "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S. Ct. at 2738. The district court in this matter held that McArdle was entitled only to qualified immunity for certain of her actions in the criminal matter. "Prior to the decision to seek an indictment, Sencer-McArdle was functioning as an investigator or engaging in investigative activities, conduct not protected by absolute immunity." *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 360 (D.N.J. 1999).

The "objective reasonableness" test this Court articulated in *Harlow* requires a court's review of "not only the currently applicable law, but whether the law was clearly established at the time an action occurred." 457 U.S. at 818, 102 S. Ct. at 2738. This Court further explained the "objective reasonableness" test in *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d (1986). In *Malley*, this Court explained that "defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 475 U.S. at 341, 106 S. Ct. at 1096.

Here Michaels cannot articulate a colorable argument that the district court erred when it determined that McArdle's interrogation techniques did not violate an accepted standard. The district court properly reviewed and examined what, if any, applicable standards existed in 1985 regarding the

interrogation of young children who were the alleged victims of child abuse. In this regard, the district court's reliance upon *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), a case factually analogous to Michaels' case, was appropriate. In *Myers*, the Court of Appeals for the Eighth Circuit framed the issue before it as follows:

> The plaintiffs have alleged however that the deputies' interrogation conduct was so improper that in essence only fabricated accusations could have emerged from the interview sessions.
>
> We examine the specific interrogation conduct identified in the record to determine whether it so exceeded accepted legal norms for the questioning of witnesses and victims that the interrogating detectives knew or should have known their conduct would violate the rights of accused persons. *We do not think it sufficient for purposes of this inquiry to determine whether fourth, fifth, sixth and fourteenth amendment rights were clearly established in 1984. Our inquiry is whether from a 1984 perspective the law was clearly established that the conduct in which the deputies engaged would violate such rights.*

Myers, 810 F.2d at 1458-59. (Emphasis added.)

In the courts below, Michaels argued that the Supreme Court of New Jersey's opinion in the criminal matter, *State v. Michaels*, 136 N.J. 299 (1994), settled the question as to whether McArdle could rely upon the affirmative defense of qualified immunity. Michaels argued that the Supreme Court of New Jersey's determination that the State's investigation, particularly the manner in which the children were interviewed, was "professionally inept" stripped

McArdle of her entitlement to the protection of qualified immunity. However, Michaels failed to address the sources upon which the Supreme Court of New Jersey relied in making its determination that the manner in which the children were interviewed was "professionally inept".

The Supreme Court of New Jersey cited from a variety of learned treatises, studies of children, rules of evidence and case law to reach its conclusion that the State's investigation of the sexual abuse allegations against Michaels was "professionally inept". However, under the *Harlow* test of "objective reasonableness" the Supreme Court of New Jersey's determination that the investigation was "professionally inept" does not equate with a finding that her actions were "plainly incompetent" for purposes of determining her entitlement to qualified immunity. A critical component of a court's determination that an actor's conduct was "plainly incompetent" is an assessment of the conduct in light of the clearly established law at the time the conduct occurred. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. That assessment was not part of the Supreme Court of New Jersey's opinion.

Instead, the Supreme Court of New Jersey relied upon the materials that had developed on the subject of the best method for interviewing children who were the alleged victims of sexual abuse during the nine years subsequent to the State's investigation into the sexual abuse allegations against Michaels and prior to the Court's decision. *State v. Michaels*, 136 N.J. at 309-12. Finally, the Court relied upon what it referred to as "judicial recognition of the very same concerns expressed in the academic literature and addressed by the guidelines established by governmental authorities with respect to the improper interrogation of alleged child sex abuse victims", *id.* at 312, to support its conclusion regarding the impropriety of the interviews in Michaels' case. All of the cases cited by the New Jersey Supreme Court were

decided in either 1990 or 1991. *Id.* The Court's conclusion that "the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events", *id.*, was based upon its review and assessment of all of the aforementioned materials.

The district court observed, correctly, that "unfortunately for Michaels herself, the *Michaels* case inspired a change in the law." *Michaels*, 50 F. Supp. 2d at 364-65. Furthermore the district court acknowledged the existence of an important distinction in the governing standard as between Michaels' claims as a defendant in the criminal action and her claims as a plaintiff in a § 1983 civil action:

> [T]here is an important distinction between what the Appellate Division and the Supreme Court of New Jersey did and said on the *Michaels* appeal and what Michaels asks this court to do today. Both of the New Jersey higher courts that dealt with the case were permitted to enjoy the benefit of hind-sight; this court is not. Indeed, the information on which the Appellate Division and the New Jersey Supreme Court relied in 1993 and 1994, respectively, came from articles and journals published ***after*** Michaels was found guilty.

Michaels, 50 F. Supp. 2d at 365. (Emphasis added.)

A clear distinction can be drawn between McArdle's actions in this matter and Agent Cooper's actions in *Clanton*. As the district court noted in this matter "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Michaels*, 50 F. Supp. 2d at 365. The district court concluded "considering what little was

known in the mid-1980's, this court cannot say that the defendants transgressed any 'bright lines'." *Id.*

Conversely, in *Clanton* the Court of Appeals for the Tenth Circuit ruled that Agent Cooper had, in fact, transgressed a bright line regarding the use of a coerced confession. It was that determination that stripped him of qualified immunity. In *Clanton*, after determining that Cooper's false representation to a suspect that physical evidence linked the suspect to the crime did not render the confession coerced, *Clanton*, 129 F.3d at 1158, the court turned its attention to the remaining allegation against Cooper:

> Cooper also told Michael that he would get a twenty-five year sentence if he didn't confess, but would "get off lightly" if he confessed to a pattern of events suggested by Cooper. . . .
>
> Under Supreme Court and Tenth Circuit precedent, a promise of leniency is relevant to determining whether a confession was involuntary and, depending on the totality of the circumstances, may render a confession coerced.

Clanton, 129 F.3d at 1158-59.

The Court of Appeals then cited a number of United States Supreme Court and Tenth Circuit opinions that explicitly stated that what Cooper did rendered the confession he had obtained coerced. *See Clanton*, 129 F.3d at 1159. In deciding that Cooper's actions were, therefore, not protected by qualified immunity, the Court proclaimed

> all of these opinions were released before the events in this case. Thus it was clearly established at the time of the interrogation that a promise of leniency may render a confession involuntary if it was sufficiently compelling and linked to the

> confession so that it could be said that the defendant's will was overcome by the offer.

Clanton, 129 F.3d at 1159.

Thus, for all of the foregoing reasons, it is evident that Michaels' position that there is a conflict between the various Courts of Appeals on the relevant issues herein is completely devoid of merit. No such dispute exists. Therefore the petition for a writ of certiorari to address this non-existent conflict must be denied.

C. Michaels' Claim That Certiorari Is Necessary Here To Ensure That She Has The Right To § 1983 Redress Is Absolutely Without Merit And Must Be Rejected By This Court.

Finally, McArdle submits that this Court must flatly reject Michaels' contention that certiorari is necessary here to ensure that litigants, such as herself, receive redress under § 1983. Michaels contends that the Third Circuit's conclusion that she received redress through the setting aside of the criminal conviction and dismissal of the charges against her is "inconsistent with the intent of 42 U.S.C. § 1983 action. It leaves a whole class of wrongfully accused defendants without civil recourse; which is also contrary to the intent of § 1983." (Pb at 11.) Not surprisingly, Michaels cites no legal authority in support of this argument. This is so even though Michaels is asking this Court to do nothing less than ignore its own precedent so that it might create this exceptional remedy for her.

In *Imbler*, this Court expressed its understanding of the rationale for making a prosecutor absolutely immune from liability for actions taken within the scope of her prosecutorial duties as follows:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move for dismissal of the case. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which would characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

424 U.S. at 423-24, 96 S. Ct. at 991-92.

The concern of protecting prosecutors from civil liability in § 1983 actions that were brought against them for actions undertaken in their role as an advocate was also addressed by this Court in *Buckley*:

> In particular [in *Imbler*] we expressed concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his "energy and attention . . . from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 424-25. Suits against prosecutors would devolve into "a virtual retrial of the criminal offense in a new forum," *id.* at 425, and would undermine the vigorous enforcement of the law by providing a prosecutor with an incentive not "to go forward with a close case where an acquittal likely would trigger a suit against him for damages." *Id.* at 424 and n.26.

Buckley, 509 U.S. at 2614 n.4, 113 S. Ct. at 2614 n.4.

Finally, in *Kalina v. Fletcher*, 522 U.S. at 131, 118 S. Ct. at 510 (1997), this Court reiterated its position that "[w]e do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate."

Nevertheless, Michaels contends that she has been unjustly denied § 1983 redress and that the Third Circuit's conclusion that she has already received her remedy is erroneous. Neither the applicable law nor the facts of this case support this contention. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), the Court observed that a component of an official's entitlement to the protection of absolute immunity is the determination as to whether there exists "self-correction" within the system where the alleged misconduct occurred.

> [M]ost of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. . . . The judicial process is largely self-correcting: procedural rules, appeals and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

472 U.S. at 522, 105 S. Ct. at 2813.

Here, the improper actions Michaels alleges that McArdle undertook during the criminal prosecution of Michaels more than a decade ago have been remedied by the appellate courts of the State of New Jersey. On March 26, 1993, the Appellate Division of the Superior Court of New Jersey reversed the plaintiff's criminal conviction. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993). The Appellate Division's decision was affirmed by the Supreme Court of New Jersey on June 23, 1994. *State v. Michaels*, 136 N.J. 299 (1994). In *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994), the Court stated that one of the reasons that a prosecutor's decision to initiate a prosecution is a decision for which the prosecutor is absolutely immune from liability is that the criminal justice system has its own mechanism for protecting a falsely-accused defendant. "Harm to a falsely charged defendant is remedied by safeguards built into the judicial system — probable cause hearings, dismissal of the charges — and into the state codes of responsibility." *Giuffre*, 31 F.3d at 1252.

The position articulated by the Third Circuit Court of Appeals in *Giuffre* is consistent with the *Imbler* Court's clear placement of a greater value on protecting the fairness of the criminal justice system as a whole rather than on permitting the recovery of monetary damages against a prosecutor for performance of her duties as an advocate. That is so even in a case where the allegedly aggrieved defendant was convicted of a crime. In *Imbler*, this Court recognized that "[v]arious post-trial procedures are available to determine whether the accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies." 424 U.S. at 427, 96 S. Ct. at 993. The *Imbler* Court further recognized that

> in all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial received under law. The focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

Id.

The *Imbler* Court determined "the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." 424 U.S. at 427, 96 S. Ct. at 993. The Court recognized "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Id.* The Court nevertheless concluded "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.*

Here, the Appellate Division of the Superior Court of New Jersey reversed Michaels' criminal conviction and the New Jersey Supreme Court affirmed the reversal. The district court observed

> [h]aving failed to convince the trial judge that remedy was required because improper interrogation techniques which led to unreliable evidence had been used, Michaels utilized the appellate process. Slow as that process may have seemed to her, it was the appropriate method by which to challenge those techniques and that evidence.

Michaels, 50 F. Supp. 2d at 363.

The Court of Appeals for the Third Circuit also recognized that any harm Michaels may have suffered as a result of McArdle's actions had been addressed and remedied by New Jersey's criminal justice system. "Michaels' conviction was reversed and the serious charges against her were dismissed because the children's testimony was unreliable." *Michaels v. State of New Jersey, et al.*, No. 99-5486 (filed June 5, 2000), at Michaels' App. 10. Furthermore, McArdle respectfully submits that this Court must recognize the extensive pre-trial motions and hearings that were conducted in the criminal case as to the admissibility of the interviews of the various children.

In its 1993 opinion Appellate Division of the Superior Court of New Jersey "created" a "suggestibility hearing" for use in future prosecutions of alleged child sexual abusers. *State v. Michaels*, 264 N.J. Super. 579, 631-35. (App. Div. 1993). The record in the district court and the Court of Appeals for the Third Circuit in this matter clearly revealed that the hearing that the Appellate Division "created" in 1993 did in fact occur, pre-trial, in Michaels' criminal prosecution. The trial judge in the criminal matter conducted a hearing on the issue and denied Michaels' pre-trial motion to dismiss the indictments due to the alleged improper suggestibility of the interviewers' techniques. Thus the "remedy" proposed by the Appellate Division in 1993 had been employed by the trial court several years earlier. Furthermore, after he conducted the pre-trial hearing, the trial judge in the criminal matter listened to all of the audio tapes and reviewed all of the children's statements. Subsequent to doing so, the trial judge ruled that the interviews were reliable and not the product of impermissible suggestion. Thus the trial judge ultimately ruled that the children's statements were admissible.

Michaels' right to pursue appellate relief from Judge Harth's ruling, which ultimately resulted in the vacation of her conviction and the dismissal of the charges against her, serves to underscore the totality of the remedy she has already received and the correctness of the Court of Appeals' position.

CONCLUSION

Review on a writ for certiorari is not a matter of right but of judicial discretion. It is Michaels' burden to provide this Court with compelling reasons for granting certiorari. McArdle respectfully submits that a fair review of the record in this case leads to but one conclusion: Michaels has not provided any compelling reason for granting certiorari in this matter. Michaels' dissatisfaction with the Court of Appeals for the Third Circuit's unanimous affirmation of the district court's decision to grant summary judgment in McArdle's favor is understandable. However, a litigant's dissatisfaction with a court's decision cannot stand as the sole supporting basis for asking this Court to exercise its discretion and grant a writ for certiorari. Michaels' position is inconsistent with and contrary to this Court's longstanding jurisprudence that has addressed a public official's reliance upon the affirmative defenses of absolute immunity and qualified immunity. The decision of the Court of Appeals for the Third Circuit was a correct application of the relevant law to the facts of this particular case. The petition should therefore be denied.

Respectfully submitted,

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